

CARLSMITH BALL LLP

JOHN D. OSBORN  
Carlsmith Building, Capitol Hill  
P.O. Box 5241  
Saipan, MP 96950-5241  
Tel No. 670.322.3455

Attorneys for Defendant  
Bank of Hawaii

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN MARIANA ISLANDS

LAW OFFICE OF DOUGLAS F. CUSHNIE,  
a sole proprietorship, and DOUGLAS F.  
CUSHNIE, individually,

Plaintiffs,

vs.

BANK OF HAWAII and MARY ROE and  
JOHN DOE,

Defendants.

CIVIL ACTION NO. 07-0020

DEFENDANT BANK OF HAWAII'S  
REPLY TO PLAINTIFFS' RESPONSE  
MEMORANDUM TO RULE 12(b)(6)  
MOTION

Date: September 20, 2007

Time: 9:00 A.M.

Judge: Alex R. Munson

Comes now the Defendant Bank of Hawaii ("BOH") and hereby files its Reply to  
Plaintiffs' Response Memorandum to Defendant Bank of Hawaii's Rule 12(b)(6) Motion to  
Dismiss.

**I. ARGUMENT**

Indeed, the court must accept all material allegations in the Complaint as true and  
construe them in light most favorable to the plaintiff. *North Star International v. Arizona  
Corporation Commission*, 720 F.2d 587, 580 (9th Cir. 1983). While not disputing the  
assumption of veracity of Plaintiffs' allegations, BOH's reiterates the inadequacy of material  
allegations necessary to state an actionable claim. A dismissal under Rule 12(b)(6) is proper  
when there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged

1 under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 700 (9th Cir.  
2 1990). Plaintiffs' allegations fall short of sufficient facts to support their respective claims.

3 **A. Count Two (Conversion)**

4 A pleading which sets forth a claim for relief shall contain a short and plain statement of  
5 the claim showing that the pleader is entitled to relief. FRCP 8(a)(2). Plaintiffs should allege  
6 supporting facts specific to each claim by which it seeks relief, i.e. a well-pled Complaint.  
7 Judges should not have to be "pigs, hunting for truffles buried in briefs." *U.S. v. Dunkel*, 927  
8 F.2d 955, 956 (7th Cir. 1991). Thus, to the extent that the claim of conversion is so broadly  
9 drafted with allegations as to each element of conversion located in other parts of the Complaint,  
10 Plaintiffs have not sufficiently pled factual allegations for the claim of conversion under Count  
11 Two.

12 Moreover, Plaintiffs attempt to state an additional claim of intentional infliction of  
13 emotional distress under the count for conversion. To maintain a cause of action for the  
14 intentional infliction of emotional distress requires proof of four elements: (1) that the conduct  
15 complained of was outrageous; (2) that the conduct was intentional or reckless; (3) it must cause  
16 emotional distress; and (4) the distress must be severe. *Charfaurous v. Board of Elections*, 1998  
17 MP16 ¶62, 5 N.M.I. 188, 201 (1998). Plaintiffs characterize conversion as outrageous conduct  
18 merely because it is a "polite civil law description" of an otherwise criminal act. Plaintiffs'  
19 Response Memorandum to Rule 12(b)(6) Motion, at 6.

20 It is not enough that the defendant has acted with an intent which is tortious *or even*  
21 *criminal*, or that he has intended to inflict emotional distress, or even that his conduct has been  
22 characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive  
23 damages for another tort. Restatement (Second) of Torts §46 cmt. d. (1965) (emphasis added).  
24 Liability has been found only where the conduct has been so outrageous in character, and so  
25 extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as  
26 atrocious, and utterly intolerable in a civilized community. *Id.*

27 While BOH certainly does not condone any criminal acts, it is not ready to abandon all  
28 sense of reason and accept a wholesale generalization that every crime is so outrageous for

1 purposes a claim of intentional infliction of emotional distress. Plaintiffs have failed to allege  
2 any acts by BOH that remotely approach outrageous conduct or even facts that support that  
3 Plaintiffs suffered severe emotional distress for that matter. Without alleging any facts  
4 indicating any outrageous conduct or severe emotional distress, the court should dismiss  
5 Plaintiffs' attempt to inject a claim of intentional infliction of emotional distress under Count  
6 Two.

7 **B. Count Three (UCC/Ordinary Case/Bad Faith)**

8 BOH is entitled to a short and plain statement of the claim showing that the pleader is  
9 entitled to relief. FRCP 8(a)(2). It is neither the Court's nor BOH's duty to piece together the  
10 pertinent allegations throughout Complaint to make some cognizable understanding of Plaintiffs'  
11 claims. A plaintiff's obligation to provide the basis of his right to relief requires more than labels  
12 and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell*  
13 *Atlantic Corp. v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1955, 1964-65 (2007) (citing to *Papasan v.*  
14 *Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986) (a case dealing with misappropriation of public  
15 funds and not an anti-trust action)). Factual allegations must be enough to raise a right to relief  
16 above the speculative level. *Id.* at 1965 (citing 5 C. Wright & A. Miller, *Federal Practice and*  
17 *Procedure* § 1216, pp. 235-236 (3d ed.2004).

18 Plaintiffs are claiming that BOH breached its duty to them by failing to exercise good  
19 faith and ordinary care in violation of 5 CMC §4103 et seq. Such a vague and overbroad  
20 reference to the CNMI statutes allegedly violated leaves BOH to speculate which statute in  
21 particular it must defend against for supposedly violating. Plaintiffs attempt to specify the  
22 statute in their Response Memorandum by citing to 5 CMC §4103(1). However, the Court may  
23 not take into account additional facts asserted in a memorandum opposing the motion to dismiss.  
24 2 Moore's Federal Practice, §12.34(2) (Matthew Bender 3d ed.).

25 Further, to the extent that Plaintiffs attempt to allege additional facts in their  
26 memorandum opposing the motion to dismiss, neither the Complaint nor their opposition  
27 memorandum allege any facts that support a claim of bad faith by BOH. Plaintiffs fail to  
28 distinguish a failure to exercise due care from conduct constituting bad faith. There is a separate

1 statutory measure of damages if bad faith is involved, separate from the measure of damages for  
2 failure to exercise ordinary care. "Bad faith" is defined as dishonesty in belief or purpose.  
3 *Black's Law Dictionary* 56 (2d Pocket Ed. 2001). There are simply no factual allegations present  
4 in the Complaint to support a claim that BOH acted dishonestly in handling Plaintiffs'  
5 transactions. Thus, to the extent that Plaintiffs attempt to allege bad faith by BOH, the Court  
6 should dismiss Count Three since there are insufficient factual allegations supporting such  
7 claims.

8 **C. Count Six (Breach of Federal Regulation)**

9 It appears that Plaintiffs would have BOH search the entire Federal Reserve regulations  
10 and speculate which rules and regulations it allegedly violated in order to "explain what is so  
11 deficient that it cannot respond." Plaintiffs' Response Memorandum to Rule 12(b)(6) Motion, at  
12 8. Plaintiffs must allege factual predicate concrete enough to warrant further proceedings. 2  
13 Moore's Federal Practice, §12.34(1)(b) (Matthew Bender 3d ed.).

14 Plaintiffs have not pled in accord with the Federal statute. 5 CMC § 4103(2) merely  
15 gives the effect of agreements under subsection (1) to Federal Reserve rules and regulations. 5  
16 CMC §4103(3) acknowledges that following such Federal Reserve rules and regulations  
17 constitutes exercise of due care. Nowhere does 5 CMC § 4103 state that violating CNMI Bank  
18 Deposits and Collections statutes constitutes a violation of Federal Reserve rules and regulations.  
19 Plaintiffs have failed to cite any Federal Reserve regulations that equate the violation of  
20 applicable CNMI laws as violations of Federal Reserve rules and regulations themselves.  
21 Equally important, Plaintiffs have not identified any Federal Reserve rule or regulation that  
22 grants them any private right of action for such breach of rule or regulation. Thus, the Court  
23 should dismiss Count Six for failure to state a claim upon which relief can be granted.

24 **D. Count Eight (Breach of Criminal Provision)**

25 Plaintiffs again attempt to characterize a mere breach of criminal provisions as a basis for  
26 the tort of intentional emotional distress or negligent infliction of emotional distress. Plaintiffs  
27 conceded that a claim of negligent infliction of emotional cannot lie for the intentional tort of  
28 conversion. Plaintiffs' Response Memorandum to Rule 12(b)(6) Motion, at 6. The same

1 reasoning prevents a claim of negligent intentional infliction of emotional distress to lie for a  
 2 breach of criminal provisions. Defendants must intentionally commit these acts in order violate  
 3 these criminal provisions, which is the same mental state required to commit an intentional tort  
 4 as opposed to mere negligence.

5 With respect to the claim of intentional infliction of emotional distress, a criminal act  
 6 alone is insufficient to rise to the level of outrageous conduct. The rough edges of a civilized  
 7 society are still in need of a good deal of filing down, and in the meantime plaintiffs must  
 8 necessarily be expected and required to be hardened to occasional acts that are definitely  
 9 inconsiderate and unkind. Restatement (Second) of Torts §46 cmt. d. (1965). There is no  
 10 occasion for the law to intervene in every case where some one's feelings are hurt. *Id.* The  
 11 conduct alleged by Plaintiffs is the acceptance of gratuity from Plaintiffs' employee by one of  
 12 BOH's employees in violation of 4 CMC §6104. Plaintiffs do not allege any conduct remotely  
 13 rising to level of outrageous conduct nor do Plaintiffs allege severe emotional distress suffered.

14 Further, Plaintiffs' cited authorities do not support the proposition that a criminal act is  
 15 inherently an outrageous conduct. In all the cases, the conduct alleged is either an intentional  
 16 tort rising to the level of outrageous conduct or such conduct resulting in actual damages. *Engle*  
 17 *v. Simmons*, 41 So. 1023 (Ala. 1906) (case of trespass on the home of a lone pregnant wife who  
 18 suffered great physical pain and consequent temporary physical disability); *Herman Saks & Sons*  
 19 *v. Ivey*, 157 So. 265 (Ala. App. 1934) (case of extortion); *Davidson v. Lee*, 139 S.W. 904 (Tex.  
 20 App. 1911) (case of assault and battery); *Shall v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 145  
 21 N.W. 649 (Wis. 1914) (case of trespass in the middle of the night upon a lone widow);  
 22 *McGregor v. Barton*, 660 P.2d 175 (Or. App. 1983) (case of trespass); *Emden v. Vitz*, 198 P.2d  
 23 696 (Cal. App. 1948) (case of duress and physical threats). The Court should dismiss Count  
 24 Eight for failure to state a claim upon which relief can be granted as 4 CMC §6104 provides no  
 25 private right of action to Plaintiffs.

## 26 **II. CONCLUSION**

27 Counts Two, Three, Six and Eight in the First Cause of Action of Plaintiffs' Complaint  
 28

1 fail to meet the standards required by Rules 8 and 12(b)(6) because they do not provide sufficient  
2 factual allegations to enable the Court to determine whether a recognized legal theory exists.  
3 The Court is respectfully requested to dismiss Counts Two, Three, Six and Eight for failure to  
4 state a claim upon which relief can be granted.

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6 CARLSMITH BALL LLP

7  
8 DATED: Saipan, MP, September 13, 2007

/s/ John D. Osborn

JOHN D. OSBORN

Attorneys for Defendant

Bank of Hawaii